IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

O R D E R

S.B. CRIMINAL MISC. PETITION NO.131/2006
(M/s. Bakemans Ind. Pvt. Ltd. & Ors. Vs. State & Ors.)

Date of order : August 10, 2006

P R E S E N T

HON'BLE MR. JUSTICE GOPAL KRISHAN VYAS

Mr. Sandeep Mehta, for the petitioners.
Mr. Ashok Upadhyay, Public Prosecutor.
Mr. Sampat Raj Sharma, for non-petitioner.

By way of filing the present petition under Section 482 Cr.P.C., the petitioners have prayed for quashing of FIR No.301/2005 filed against them at Police Station, Kotegate, Bikaner.

As per the facts of the case as have been narrated in the instant petition, it is stated that the petitioner No.1 is a private limited company registered under the Indian Companies Act, 1956 and is engaged in the manufacturing of biscuits. According to the petitioner firm, due to dispute with State Industrial Corporation of Maharashtra (hereinafter referred to as “SICM” only), SICM put lock on the

factory of petitioners in the month of July, 2003. At the time of putting lock on the factory by SICM, manufactured material worth Rs.2 crores was lying in the factory. It is further stated in the petition that non-petitioner No.2 – Narendra Sharma was appointed as C&F agent by the petitioner company in the later half of 2002 and for this purpose he deposited Rs.7 lacs as security in the company. It is also contended that he also sent some advance money, against which the company sent goods worth lacs of rupees to him but during this process due to action taken by SICM, the remaining part of goods could not be sent to Narendra Sharma. It is further contended that the proceedings were initiated against the petitioner company by certain creditors before Hon'ble Delhi High Court for winding up of the Company vide order dated 6.4.2004 whereby Hon'ble Delhi High Court directed to appoint Official Liquidator. Further on 17.7.2004, an order was made for auctioning the Company. Both the orders have been placed on record as Annexure-1 and Annexure-2. In the petition, it is further stated that a complaint was filed by complainant, which is under challenge, alleging that he deposited Rs.7 lacs as security in the petitioner – Company and also made payment of advance to the company but when the goods in lieu of said advance were not being sent to him, he made enquiry, then, he came to know that the Company has been closed and as such his money has not been returned to him. Thus,

he filed the report for offence under Sections 406, 420 and 120-B I.P.C. and thereafter investigation commenced.

It is contended by the learned counsel for the petitioners that in the list of creditors filed by the petitioner - Company before Hon'ble Delhi High Court, the name of complainant – Narendra Sharma has been shown at Serial No.455. Meaning thereby, the petitioner – Company is not refusing its liability to pay the amount of complainant but the present FIR has been filed with malafide intention and knowingly well that it is a case of civil nature and there has not been any dishonest intention at any point of time to cheat the complainant as it is an admitted fact that the petitioner – company has disclosed that there is liability towards the complainant. It is further contended that Company has already submitted detailed statement of account/books of account before the Official Liquidator including the list of creditors to whom the payment is to be made and now the matter is pending adjudication before the Official Liquidator. Further, it is contended that subsequent to aforesaid orders, even under the supervision of the Executive Court bids were invited and the bid of one M/s. Ceylong Biscuits Limited which was of Rs.12.50 Crores was found to be highest and the same was accepted. Learned counsel for the petitioners has also invited the attention of this Court towards Section 446 of the

Companies Act and prayed that there is a bar for initiation of any proceeding against the Company where a winding up order is made or an official liquidator has been appointed as provisional liquidator. Further, it is contended that upon the aforesaid circumstances, the case is of civil nature and there was no dishonest intention on the part of the petitioner – Company, which is obvious from the admitted fact of the case that in the list of creditors filed before the official liquidator, the name of complainant is shown at Serial No.455. Therefore, no offence under Sections 406, 420 and 120-B I.P.C. is made out against the petitioners. The F.I.R. against the petitioners as per the petitioner's case is nothing but an abuse of process of Court. So also, it is contended that upon a bare reading of F.I.R., no prima facie case disclosing cognizable offence is made out against the petitioners. It is prayed that attempt of filing F.I.R. against the petitioner – Company is blatant misuse of process of Court. The company was supplying the goods to the complainant earlier and subsequently the supply of goods was stopped because the company had been closed as per judicial order. The circumstances were beyond the control of the petitioners, therefore, it cannot be said that offence under Section 420 I.P.C. is made out against the petitioners. It is prayed that the case is of civil nature and only on the basis of concocted false story that despite demand no payment

of dues was made by the company. It is contended by the learned counsel for the petitioner that first of all as per the provisions of Companies Act, no suit/legal proceedings can be initiated/commenced when when a winding up order has been made or an official liquidator has been appointed as a provisional liquidator. Further, it is contended that police officer, investigating into the matter is subject to two conditions. Firstly, the police officer should have reasons to suspect the commencement of the cognizable offence and secondly the police official should subjectively satisfy himself as to whether upon perusal of FIR, any offence is made out for entering into investigation. It is contended that as per the FIR, it is clear that the facts are concocted one and the FIR has been registered under the influence of complainant without any contents of criminal offence and thus, as per the counsel for the petitioners, putting the personal liabilities of a citizen into danger. It is also contended that the complainant can approach the official liquidator for settlement of his claim as the same is already pending. While emphasizing upon the point of civil nature and disclosure of the name of non-petitioner No.2 in the list of creditors, it is vehemently contended by the learned counsel for the petitioners that it is a case where powers under Section 482 Cr.P.C. may be exercised and FIR may be quashed.

Learned counsel for the petitioners has relied upon the judgment rendered by Hon'ble Supreme Court in case of Anil Mahajan Vs. Bhor Industries Ltd. & Anr., reported in (2006) 1 SCC (Cri) 746 wherein Hon'ble Supreme Court has held as follows :-

> "From mere failure of a person to keep up promise subsequently, a culpable intention right at the beginning, that is, when he made the promises cannot be presumed. A distinction has to be kept in mind between mere breach of contract and the offence of cheating. It depends upon the intention of the accused at the time of inducement. The subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent, dishonest intention is shown at the beginning of the transaction. The substance of the complaint is to be seen. Mere use of the expression "cheating" in the complaint is of no consequence."

Learned counsel for the petitioners has cited yet another judgment reported in (2006) 2 SCC (Crimes) 49 and contended that the Hon'ble Supreme Court has quashed the FIR itself in the aforesaid case wherein no offence was made out. Therefore, it is contended by the learned counsel for the petitioners that the FIR in the present case deserves to be quashed, which is totally abuse of process of law.

Par contra, learned Public Prosecutor as well as learned counsel for the non-petitioner No.2 vehemently opposed the petition.

Learned counsel for the non-petitioner No.2 contended that intention of the petitioner – Company was bad from initial stage itself. Further, it is contended that non-petitioner No.2 was appointed as C&F agent on 19.10.2001 and did the work with the petitioner company only for five months upto 19.3.2002. Further, it is contended that the petitioner – company is an old company and they never appointed C&F agents prior to it and when their internal financial position became bad then they thought to collect money by way of appointing C&F agent and in this way they appointed so many C&F agents in Rajasthan, which is more than 20 and collected huge amount of money by way of security deposits. The internal financial position was not known to agents nor it was conveyed to them. On the contrary, it was assured that they are financially sound, therefore, it was a pre-planned cheating from initial stage. It is contended that Rs.7 lacs were deposited by non-petitioner as security on 19.10.2001 but the petitioners have wrongly mentioned that it was deposited in later half of 2002. Thereafter, till 19.3.2002, no goods were dispatched to non-petitioner and as and when non-petitioner contacted the petitioner – company, it was assured by them that they are sending the goods. These documents were also placed before the Investigating Officer. It is also contended that when the petitioner company failed to dispatch the goods inspite of credit balance of

Rs.3,10,345.55 paisa. At that time, there was no occasion to encash the cheque but they encashed the cheque on 23.3.2002 and when business transactions were not fair, then, non-petitioner asked the petitioner company to refund the security amount and also wrote that they do not want to work with the petitioner company. The petitioner company also wrote a letter on 31.7.2002 but no reply was given. It is also contended that the petitioner company never informed about the financial dispute with SICM and winding up proceedings so also the fact that SICM has put lock upon the Factory in July, 2003. It is also contended by the learned counsel for non-petitioner No.2 that when the petitioner company was having stock of goods worth Rs.2 crores then who prevented the petitioner company to dispatch the goods or refund the security amount. It is further contended that TDS of Rs.3826/- was also deducted in the month of September, 2002 from the interest upon the security deposit and the same was never deposited in the Income Tax Department nor any T.D.S. certificate was issued by the petitioner company. The fact of deduction of T.D.S. is clear from letter dated 18.9.2002. It is further contended that knowingly well that the petitioner's position was not financially sound at the time of appointment of non-petitioner No.2 as C&F agent even though it was assured that the financial condition of the petitioner company is sound but in fact only to collect the money, the petitioner company

appointed so many C&F agents in the Rajasthan by way of mis-representation. In these circumstances, it is obvious that while misrepresenting the financial condition of the company huge amount of money was collected by the petitioner company and later on creditors filed application for appointment of official liquidator after putting lock upon factory by SICM, therefore, it is clear that from the initial stage, there was bad intention on the part of the petitioners to cheat the persons by way of appointing them as C&F agents. Therefore, it is a clear cut case of breach of trust and from bare perusal of FIR prima facie case is made out against the petitioners. It is also contended that provisions of Section 466 of Companies Act will not apply to the present case because Hon'ble Delhi High Court has passed the order for appointing Official Liquidator in the year 2003 but in fact cheating was committed by the petitioners prior to appointment of official liquidator and huge amount of security money was collected by misrepresenting the facts of unsound financial condition of the petitioner company. It is further contended that when goods of worth Rs.2 crores was lying the factory at the time of putting lock by SICM, then, the question arises as to why the goods were not supplied by the petitioner company. Therefore, the matter is required to be investigated thoroughly and the F.I.R. Certainly contains the ingredients of offence under Sections 406, 420 and 120-B I.P.C.

Thus, it is prayed that this no interference is warranted by this Hon'ble Court and if at all investigating agency after completion of investigation comes to the conclusion that no offence is made out, then, certainly final report will be submitted by the Police.

It is also contended that the petitioner company is not disputing the facts that Rs.7 lacs and other amounts were deposited by the non-petitioner as security amount; that T.D.S. was deducted and the same was not deposited in the Income Tax Department. The official liquidator is also accepted to be appointed on 6.4.2004 and as per the facts of the case narrated by the petitioners SICM put lock on the factory in the month of July, 2003, meaning thereby, the money was collected by way of cheating the non-petitioners by the petitioner company. Therefore, clear cut case is made out against the petitioners. It is prayed that FIR does deserve to be quashed and regular investigation may be allowed to be conducted by the investigating agency.

Learned counsel for the non-petitioner contended that right from beginning the intention of the petitioner company was to cheat the non-petitioner and thus, without disclosing the correct financial position of the company, huge amount by way of security money was got collected and material was not

supplied and as per the contention of the petitioner company also at the time of putting lock by SICM, material worth Rs.2 crores was lying in the factory. If it was so, then, it can very well be said that with malafide intention the material was not supplied, therefore, provisions of Section 446 of the Companies Act are not attracted in the present case because non-petitioner No.2 was cheated prior to initiation of proceedings for appointment of official liquidator. In these circumstances, it is prayed that thorough investigation in the matter is required to be conducted by Investigating Agency and it is not a fit case for interference under Section 482 Cr.P.C.

In support of his arguments, learned counsel for the non-petitioner No.2 has placed reliance upon the judgment rendered by Hon'ble Supreme Court in case of State of Haryana & Ors. Vs. Bhajan Lal, reported in 1992 Supp (1) SCC 335 wherein it has been held that while exercising the power under Section 482 Cr.P.C. to prevent the abuse of process of the court or otherwise to secure the ends of justice, the High Court is required to see where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused, then FIR can be quashed. Certain other guidelines were also enumerated in the aforesaid judgment.

I have perused the entire pleadings of both the parties and gone through the case diary and considered the arguments raised by both the parties.

The contention of the learned counsel for the petitioners that it is a case of civil nature and they are admitting their liability but for the reasons that as per the orders of Delhi High Court on 6.4.2004, Official Liquidator was appointed and in the list of creditors filed before Delhi High Court, the name of non-petitioner No.2 finds mention at Sl. No.455 and in this connection, he has emphasized upon the judgment rendered by Hon'ble Supreme Court in case of Uma Shankar Gopalika Vs. State of Bihar & Anr., reported in (2006) 2 SCC (Cri) 49 and contended that as per the aforesaid judgment, criminal proceedings are required to be quashed because it is a civil dispute.

I have perused the aforesaid judgment. The relevant portion of the aforesaid judgment is as under :-

> "Now the question to be examined by us is as to whether on the facts disclosed in the petition of complaint any criminal offence whatsoever is made out much less offences under Section 420/120-B IPC. The only allegation in the complaint petition against the accused persons is that they assured the complainant that when they receive the insurance claim amounting to Rs.4,20,000, they

> would pay a sum of Rs.2,60,000 to the complainant out of that but the same has never been paid. Apart from that there is no other allegation in the petition of complaint. It was pointed out on behalf of the complainant that the accused fraudulently persuaded the complainant to agree so that the accused persons may take steps for moving the Cunsumer Forum in relation to the claim of Rs.4,20,000. It is well settled that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating. In the present case, it has nowhere been stated that at the very inception there was any intention on behalf of the accused persons to cheat which is a condition precedent for an offence under Section 420 I.P.C."

From a bare perusal of the aforesaid judgment, it is clear that in that case, the Hon'ble Supreme Court quashed the proceedings on the grounds that breach of contract would amount to cheating only if the intention to cheat was existing at the very inception. If such intention is developed later on, the same would not amount to cheating. However, in the present case, the circumstances are altogether different. As per the allegations levelled against the petitioner Company, right from beginning when the non-petitioner No.2 was appointed as C&F agent and deposited a sum of Rs.7 lacs with the petitioner company in the month of October, 2001 the intention was to procure the amount from the market because in

past no C&F agent was appointed by the petitioner company and in the year 2001, twenty C&F agents including the non-petitioner No.2 were appointed without disclosing them the financial dispute with SICM, so also, the poor financial condition of the petitioner Company. This fact of cheating can also be gathered from the facts narrated in the petition that at the time of putting lock upon the petitioner company by SICM in the Month of July, 2003, manufactured material worth Rs.2 crores was lying in the factory but the same was not supplied to the non-petitioner No.2 though orders were placed in between March, 2002 to July, 2003. Therefore, the aforesaid judgment cited by the learned counsel for the petitioners does not support the contention of the petitioners. More so, the facts of the case are entirely different.

Further, it is required to be said that the inherent powers vested with High Court under Section 482 Cr.P.C. can be exercised at any stage as per the language of Section 482 Cr.P.C., <u>if necessary to give effect to any order under the Code to prevent abuse of the process of any Court or otherwise to secure the ends of justice</u>. Here in this case, FIR was filed on 26.12.2005 against the petitioner – Company and it immediately rushed to Court by way of filing present petition under Section 482 Cr.P.C. on 30.1.2006, praying that FIR may be quashed. It is true that

inherent powers can be exercised to secure the ends of justice but for the same it is the duty of the Court to see that whether upon perusal of the FIR, the offence is made out or not. If yes, then, certainly it requires regular investigation. The investigation of an offence is the field exclusively reserved for the police officers whose powers in that field are unfettered so long as the power to investigate into the cognizable offence. It is also expected from the Investigating Officer that he will investigate the matter within his powers and under the provisions of the Code of Criminal Procedure. Mere on the basis of presumption that Investigating Officer will not consider entire factual matrix as well as the evidence of the case and will take action, cannot be a ground for interference under Section 482 Cr.P.C. Courts are required to see whether upon perusal of FIR offence is made out.

In case of State of Haryana Vs. Bhajan Lal, reported in 1992 Suppl (1) SCC 335, Hon'ble Apex Court gave certain guidelines and according to that where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused, then, such powers are required to be exercised. Therefore, first of all it is to be seen in this case whether upon perusal of FIR, it

prima facie constitute any offence or not. It is true that complainant has specifically alleged in the FIR that he was cheated by the petitioner company and he was appointed as C&F agent in the Month of October, 2001 and he deposited Rs.7 lacs with the petitioner company and at that time financial dispute with SICM or the financial status of the petitioner company was not conveyed. So also, it is categoracally stated that after 19.3.2002 though cheques were encashed by the petitioner company but material was not suppplied. In these circumstances, it is obvious that upon the perusal of FIR, it cannot be said that no offence is made out. The later story which is narrated by the petitioners with regard to appointment of Official Liquidator as per the orders of Hon'ble Delhi High Court on 6.4.2004, it is clear that money of complainant was lying with the petitioner company but neither the money was returned nor the manufactured material was supplied to the complainant by the petitioner company and ultimately, Official Liquidator was appointed. On one hand, the petitioner company is accepting its liability and on the other hand, it is no where stated in the petition that as to why the manufactured material worth Rs.2 crores which was lying with the petitioner company as per their own contention was at the time of putting lock by SICM in the month of July, 2003. The said material was not sent to the complainant from March, 2002 to July, 2003. From this fact, it can be said that prima facie

case is made out which requires investigation. It is also true that High Court can exercise inherent powers vested in it under Section 482 Cr.P.C. to secure the ends of justice and even FIR can be quashed but at the time of passing such an order, the Court will not loose its sight that as per the provisions of Code of Criminal Procedure, if remedy is available with the petitioners to bring all material before the Investigating Officer with regard to their innocence, then, power is left with the investigating Officer to arrive at with the finding before taking any action whether offence is made out or not, then, it is not proper for this Court to exercise powers under Section 482 Cr.P.C. It is also required to be said that Legislature at the time of enactment of Indian Penal Code clearly provided under Section 182 that if any false information is filed by the complainant with intent to cause public servant to use his lawful power to the injury of another person, then, he shall be liable to be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. Therefore, in this case, the matter is required to be investigated by the Police and no interference in the investigation is required to be made by this Court. In this case, the petitioner company is not refusing their liability but only contention has been raised that due to financial dispute with SICM, the Company was closed and Official

Liquidator was appointed under the orders of Hon'ble Delhi High Court and before the Court, the list of creditors was filed by the petitioner Company in which name of complainant finds mention at Sl. No.455 but all this has been done in the year 2004 when the matter was pending before the Delhi High Court. The complainant is raising voide that he was cheated right from initial stage and there was clear cut intention at the time of appointment of the non-petitioner No.2 as C&F agent in the month of October, 2001 and therefore, at this stage, it cannot be said that no offence under Sections 406, 420 and 120-B I.P.C. is made out against the petitioners. Therefore, regular investigation is required to be made.

In these circumstances, I am of the opinion that no interference under Section 482 Cr.P.C. is warranted. The petition stands dismissed.

(GOPAL KRISHAN VYAS), J.

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